If regard is paid to such sales, then it will be seen that the range of $8,000-$10,000 represents one extreme and the range of $2,000-$4,000 the other end. Further if consideration is paid to the fact that the anticipated development of the locality has not taken place or has not taken place at the rate once thought of as possible and reasonable, then the conclusion must regrettably be reached that the award of the collector errs on the high side.

I have not only the benefit of a more extended hearing and rather fuller evidence but, what is of greater value, the considered opinions of two very experienced assessors. After discussions, we have agreed on a figure of $6,000 per acre.

I therefore revise the Collector of Land Revenue's valuation by reducing his figure of $8,500 per acre to $6,000 per acre. There shall be no order as to costs.

Under section 41(3) I award $300 to each assessor for their several attendances in court. Apart from their attendance, they have by themselves made personal inspection of the land.

It only remains to thank the assessors, Inche I. W. Hake and Tuan Haji K. Mushir Ariff and the several counsel for their great assistance to me.

Order accordingly.

Solicitors: *Lim, Lim & Oon.*

OTHMAN & ANOR. v. MEK

[F.C. (Ong C.J. (Malaya), Ali and Ong Hock Sim F.JJ.)
July 7, 1972]
[Ipoh — Federal Court Civil Appeal No. 87 of 1971]

Practice and Procedure — Appeal — Cause of action — Plea of res judicata — When applicable.

Land Laws — Jual janji — Claim for execution of transfer of land — Limitation — National Land Code, s. 417(1).

Limitation — Right becoming unenforceable — Question of res judicata.

Evidence — Res judicata — Right in rem — Claim in personam.

This was an appeal from the decision of the High Court ([1971] 2 M.L.J. 214) which had dismissed the plaintiffs' claim for a declaration.

The appellants, legal personal representatives of the late Haji Ahmad, claimed for a declaration that the respondent, as registered proprietor of a half undivided interest in two parcels of land, held the same in trust for the appellants. The material facts were that in Civil Suit No. 120 of 1958, the plaintiff, Haji Ahmad, sued for specific performance of a *jual janji* agreement. He pleaded the contract, full payment of the agreed price and his being given possession of the lands and titles thereto upon making such payment. The relief claimed by him from the defendant (who was the respondent's late husband) was the execution of a transfer of the lands in his favour. The present appellants' pleaded that after such payment, the respondent remained on the land register merely in the capacity of trustee, and was bound by law to convey the said lands to the rightful beneficial owner.

In the court below, the claim was defeated by a plea of *res judicata* by virtue of a judgment of the Court of Appeal in *Mek* v. *Haji Ahmad.*(6)

The question before the Federal Court was whether the appellants' rights could be defeated by the judgment of the Court of Appeal.

Held, by a majority, allowing the appeal: the appellants were entitled to the declaration, as prayed, and for the consequential relief that the proper registering authority do cause the necessary entries and memorials to be made in the issue and register documents of title for the appellants to be registered as proprietors of the lands concerned in respect of the undivided interests as claimed.

Per Ong C. J. (Malaya), allowing the appeal: "The plea of *res judicata* was wholly misconceived. The Court of Appeal, in effect, affirmed the decision of the lower court relating to the substantive rights of the appellants, and reversed the learned judge on a pure question of procedure relating to limitation.... my opinion is that the trial judge in this case was bound by that part of the judgment of the Court of Appeal — regardless of its views on the unenforceability of the *jual janji* agreement — as decided that Haji Ahmad must be accepted as the equitable owner of the lands. No question of *res judicata* — concerning limitation only — can possibly derogate from the judgment establishing the rights of the purchaser. This vital part of the judgment was wholly ignored or overlooked by the trial judge.... What the appellants now seek is not specific performance of the agreement, but the muniments of title successfully established in court — which, as a cause of action, is a horse of a totally different colour from that pleaded in Civil Suit No. 120 of 1958".

Per Ali F.J., dissenting: "The series of facts relied upon by the appellants for their present claim are substantially the same as those relied upon by the plaintiff in the 1958 Civil Suit. They are being deployed now by the appellants to support a claim under a different name which is an abuse of the process of the court. and contrary to the principle that in the public interest there should be an end to litigation. In this case, the plaintiff had only one cause of action founded on the right, contractual or equitable, to have the lands transferred to him. As the learned trial judge was only concerned with the question whether the appellants were estopped from taking further action, it is only right that the case should go back to the High Court to be disposed of on the merits".

Per Ong Hock Sim F. J., allowing the appeal: "The appellants assert their title and interest, which is a right in *rem*, to the lands. *Res judicata* only bars specifically the appellant's claim *in personam*.... the court has powers now under section 417(1) of the National Land Code to make such order as it thinks just and proper.... the maxim to be applied is *ubi jus ibi remedium.*"

Cases referred to:-

(1) *Lysaght* v. *Edwards* (1876) 2 Ch. D. 499, 506.
(2) *Henderson* v. *Henderson* (1843) Hare 100, 115; 67 E.R. 319.
(3) *Holmes* v. *Crowther* [1970] 1 W.L.R. 835.
(4) *Duedu* v. *Yiboe* [1961] 1 W.L.R. 1040.
(5) *Kok Hoong* v. *Leong Cheong Kweng Mines Ltd.* [1964] 2 W.L.R. 150.
(6) *Mek* v. *Haji Ahmad* [1960] M.L.J. 133.
(7) *Brunsden* v. *Humphrey* (1884-85) 14 Q.B.D. 141.
(8) *Greenhalgh* v. *Mallard* [1947] 2 All E.R. 255.
(9) *Hoystead* v. *Commissioner of Taxation* [1926] A.C. 155.
(10) *Howlett* v. *Tarte* (1861) 10 C.B.N.S. 813.
(11) *New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.* [1939] A.C. 1.
(12) *Thoday* v. *Thoday* [1964] 1 All E.R. 341.
(13) *Bolo* v. *Koklan & Ors.* L.R. 57 I.A. 325, 331.
(14) *Nasri* v. *Mesah* [1971] 1 M.L.J. 32, 34.
(15) *Williams* v. *Greatrex* [1957] 1 W.L.R. 31, 36.
(16) *Mills* v. *Haywood* (1877) 6 Ch. D. 196, 202-3.
(17) *Bridges* v. *Mees* [1957] 2 All ,.R. 577.
(18) *Bachan Singh* v. *Mahinder Kaur & Ors.* [1956] M.L.J. 97, 98.

FEDERAL COURT.

Lim Kean Chye (*A. Jayadeva* with him) for the appellants.

Eugene Khoo for the respondent.

Ong C.J. (Malaya): This is an exceptional and difficult case in which my brethren have reached different conclusions. It behoves me, therefore, to state fully my reasons for preferring one to the other.

All the relevant facts have been set out in the other judgments, thus sparing me the task of repeating them here. I need therefore only refer briefly to such facts as I consider material to my decision.

In Civil Suit No. 120/58 the plaintiff, Haji Ahmad, sued for specific performance of what Hill J. described as a typical *jual janji* agreement. He pleaded the contract, full payment of the agreed price and his being given possession of the lands and titles thereto upon making such payment. The relief claimed by him from the defendant (who is the present respondent) was simply the execution of a transfer of the lands in his favour.

By her defence, the respondent traversed all allegations of fact set out in the statement of claim, except as to Haji Ahmad being in possession of the lands as purchaser. His possession, she alleged, was by virtue of a lease given to Haji Ahmad by her late husband. This, of course, made the question of title an issue clearly falling to be decided in the action. Accordingly, the question of fact which Hill J. said he had to determine was whether Haji Ahmad had paid the purchase price of $1,300 in full and the learned judge found as a fact that it was so. He accordingly ordered specific performance.

If, as the respondent alleged in her defence, Haji Ahmad was merely in possession as a tenant or lessee and he was disputing the title of the landlord or lessor, the respondent should, as a matter of course, have added to her defence a counterclaim for repossession. She did not. Her appeal against the decision of Hill J. was solely confined to one ground — that the trial judge erred in holding that Haji Ahmad's possession of the lands and titles thereto defeated the plea of limitation. She succeeded on that ground in the Court of Appeal. But, by her own default, she had conceded defeat on the question of title or right to possession.

The judgment of the appeal court was delivered by Thomson C.J. In referring to the agreement it may be observed that he said: "What we are concerned with is clearly a moneylending transaction". The date of the agreement was July 14, 1936. On the evidence, such as it was, he held that the payment by Haji Ahmad must have been made not later than June 14, 1939. In his opinion time started running from that date and, irrespective of whether the period of limitation was 3 years under section 22 of the Kedah Limitation Enactment (for specific performance of a contract) or 6 years under section 26 (for recovery of land), the action was barred by limitation. On this ground, and this ground alone, Hill J. was reversed and his judgment set aside. The issue decided on appeal was simply this: was the agreement *enforceable* by action after the lapse of time?

Whilst upholding the procedural bar of limitation, it was, however, expressly stressed by the learned Chief Justice that —

"The trial judge's finding that the whole of the $1,300 was paid has not been attacked before us and must be accepted."

The order of the Court of Appeal accordingly went no further than to set aside the order for specific performance. The court was, of course, well aware that Haji Ahmad was in possession of the lands and titles. It was implicit in the judgment of Hill J. that the Haji was put in possession as a purchaser — not, as alleged by the respondent, that the Haji was a tenant or lessee. Hill J.'s finding of fact indubitably was a decision on right and title to the lands. It was an issue raised clearly on the pleadings and conclusively determined. The Court of Appeal, in express terms, affirmed the decision of Hill J. on this point.

What then was the legal position of Haji Ahmad and his successors in title, the present appellants, by virtue of the above judgment? *Lysaght* v. *Edwards*[1] provides the authoritative answer. To quote Jessel M.R.: —

"... the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of Lord Hardwicke, who speaks of the settled doctrine of the court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession".

Now, in the instant case, the appellants prayed for a declaration of their title and consequential orders and reliefs. It is true they referred incidentally to the agreement of July 14, 1936 — which the Court of Appeal in 1959 had declared unenforceable — but it was nothing more than a recital of the history whereby Haji Ahmad became entitled to be declared the true owner of the lands. What they actually pleaded as the material facts were that the respondent's late husband (who was the vendor) had been paid in full, so that, after such payment, he remained on the land register merely in the capacity of trustee. As such he was bound by law to convey these lands as directed by the beneficial owner. The respondent, as administratrix of her husband's estate, is bound by the same obligation. The appellants are the legal personal representatives of Haji Ahmad and they succeed to all his rights. The cause of action pleaded here was, therefore, not for specific performance of an agreement — no reliance whatsoever being placed on such agreement — but rather the fact that, having purchased the lands and paid for them in full, the respondent was (like her late husband before her) thereby constituted in law a trustee of the lands and bound to convey them to the rightful beneficial owners. Can the rights of these appellants be defeated by the judgment of the Court of Appeal?

In answer to the statement of claim, the respondent's defence was *res judicata*. The learned trial judge held that, by reason of the judgment of Thomson C.J., constituting *res judicata*, the obligation to transfer, whether *ex contractu* or considered as an equitable obligation, was barred and "the question of a constructive trusteeship cannot arise". The key to his decision may be found in the following passage of the

judgment: —

"If it is shown that the cause of action in both are the same *i.e.* the same point or points have been decided against the parties or their privies, then the defence of *res judicata* must succeed.... The declaration which the plaintiffs seek in prayer (a) of their statement of claim appears to me to have been raised in substance in the course of the appeal and therefore constitutes one of the points adjudicated upon therein.... The plaintiffs can indeed be said to be trying to re-open the same subject of limitation in respect of matters which could have been brought forward in Civil Action No. 120 of 1958".

Citing the rule laid down by Wigram V.C. in *Henderson* v. *Henderson*,[2] the trial judge went on: —

"The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

With all due respect, I think the learned trial judge fell into the error of treating the *aim and object* of an action as having the same meaning and effect as "cause of action". It is true that both in Civil Suit No. 120/58 and in the instant case, the objective was the same. But the same result can be achieved by different means, relying on different causes of action. This is axiomatic and needs no explanation or illustration.

Indeed, the plea of *res judicata* was wholly misconceived. By this plea it seems to me that the respondent, by her defence, is hoist on her own petard. The Court of Appeal in effect affirmed Hill J. on one point — relating to the substantive rights of the litigants — and reversed the learned judge on a pure question of procedure. Statutes of limitation which bar the enforcement of a right by action are rules of procedure only: see 24 *Halsbury*, 3rd Ed. page 181. A right which becomes unenforceable merely by reason of limitation does not *ipso facto* perish or vanish into thin air: see *Holmes* v. *Crowther*[3] where it was held that, although under section 18(5) of the Limitation Act, 1939, arrears of mortgage interest outstanding for more than six years are *irrecoverable by action*, the mortgagors nevertheless were only entitled to the equitable remedy of redemption provided that they paid all arrears of mortgage interest, *whether statute-barred or not*. If, as in that case, equitable rights did not perish by reason of limitation, can this same defence be set up here to deny the rights of a beneficial owner to be granted his claim to the legal title?

What, however, is of truly vital importance in the judgment of the Court of Appeal, was the declaration of title in favour of Haji Ahmad. It established beyond equivocation what the respondent is forever estopped from denying. Here then is a perfect example of estoppel by matter of record. The appellants, on the strength of the appeal court's decision, comes before the court in the instant case for consequential orders pursuant thereto. The appeal court in 1959 could not have made any such order then, because the question to be determined had to be confined to what was actually raised in the memorandum of appeal. With the question of title decided in his favour, leaving him in complete undisputed possession of the lands, why should Haji Ahmad proceed with his appeal to the Privy Council when maturer reflection, and doubtless sound legal advice, persuaded him that the decision of the Court of Appeal had as little effect on his right and title as water on a duck's back.

In short, my opinion is that the trial judge in this case was bound by that part of the judgment of the Court of Appeal — regardless of its views on the unenforceability of the *jual janji* agreement — as decided that Haji Ahmad must be accepted as the equitable owner of the lands. No question of *res judicata* — concerning limitation only — can possibly derogate from the judgment establishing the rights of the purchaser. This vital part of the judgment was wholly ignored or overlooked by the trial judge.

On this very point I fail to see how any court in Malaysia can refuse to give effect to a final judgment of a court of competent jurisdiction determining who was the true beneficial owner of the lands. What the appellants now seek is not specific performance of the agreement, but the muniments of title successfully established in court — which, as a cause of action, is a horse of a totally different colour from that pleaded in Civil Suit No. 120/58. In my view *Duedu* v. *Yiboe*,[4] a Privy Council decision, is quite indistinguishable from the instant case. The relevant headnote there reads: -

"The ownership of the land was decided in favour of the respondent in the 1944 action and would have settled his title to the land, and if he had counterclaimed he should have obtained a declaration of title. In the present proceedings founded upon the judgment he had earlier obtained he was entitled to the reliefs claimed."

It may be argued that Haji Ahmad, in the same action, should have prayed for a declaration, as well as specific performance. Any such view, in my opinion, is wholly unjustified. Were the action for specific performance to fail for lack of evidence establishing the contract and its performance on the part of the purchaser by payment of the agreed price, it would have been the end of the whole matter and such further prayer would in the event have been superfluous and wholly pointless. Hence no neglect or default can really be attributed to Haji Ahmad in not setting out his whole case — which may be the basis of the *ratio decidendi* of the trial judge here. But the Haji did succeed in establishing as a fact what he had set out to prove. That his claim was defeated by a simple plea of limitation was tantamount to a confession and avoidance, to which estoppel cannot apply: see judgment of Lord Radcliffe in *Kok Hoong* v. *Leong Cheong Kweng Mines Ltd.*[5] at page 157, where his Lordship said: —

"... while such a judgment can give rise to estoppel in subsequent proceedings, the defendant in such proceedings is estopped only from asserting something which, if pleaded in the earlier action, would have amounted to a *direct traverse* of what was there asserted and founded upon by the party who obtained that judgment. Thus, if what he wishes to set up in the second action would have been matter only for a plea by way of confession and avoidance or, it seems, a special plea in the first action, there is no estoppel."

A plea of limitation is, of course, what Lord Radcliffe termed a special plea, to which estoppel cannot apply.

I would therefore allow the appeal with costs here and in the court below. The order of Wan Suleiman

J. is set aside and I would make the orders as prayed. The deposit of $500 should be refunded to the appellants.

Ali F.J.: In this appeal the dispute is over the undivided half shares in two pieces of lands of which the respondent, as administratrix of her husband's Estate, is the registered proprietress. The appellants, as administrators of the Estate of Haji Ahmad bin Yusof, deceased, are seeking a declaration that they are entitled to the beneficial interests in those half shares. As consequential relief they asked for an order of transfer.

The question which arose for the consideration of the trial court was whether the appellants' action was frivolous, vexatious and an abuse of the process of court by reason of the fact that the said dispute being the subject matter of a previous litigation — Civil Suit No. 120 of 1958 — between the said Haji Ahmad bin Yusof and the respondent had been finally disposed of by the Court of Appeal in Civil Appeal No. 16 of 1959.[6] This involves the consideration of the rule of estoppel *per rem judicatam* or *res judicata*. No evidence was adduced at the trial but a statement of agreed facts was filed to enable the trial court to consider the point.

From the statement of agreed facts it appears that sometime in 1936 Haji Ahmad bin Yusof had entered into a written agreement with the respondent's husband. Mohamed Saman bin Haji Sa'ad, and a lady (not involved in the present dispute) for the purchase of four pieces of lands which included the disputed lands. The respondent's husband died sometime in 1944.

In 1958 Haji Ahmad sued the respondent in the High Court at Alor Star and obtained an order directing the said half undivided shares in the disputed lands to be transferred to him. He claimed on the footing that the 1936 agreement was a *jual-janji* agreement, that is to say he sold the said lands upon the understanding by the purchasers to sell them back to him at an agreed price within a stipulated period. In the Court of Appeal, Thomson C.J. (as he then was) observed that this was "a moneylending transaction, or rather a series of moneylending transactions." He did not, however, consider the point of any great importance and proceeded to treat the agreement as a simple contract for the sale of lands and on that basis held that Haji Ahmad's claim was barred by limitation. As far as this court is concerned the Court of Appeal judgment is final and conclusive not having been reversed by the Privy Council.

It should also be stated here that as a result of the Court of Appeal judgment the respondent filed proceedings to recover possession of the disputed lands and obtained judgment against the first appellant in the present appeal, Othman bin Haji Ahmad. The case Civil Suit No. 216/65 was tried by Gill J. (as he then was) and there is now pending in this Court an appeal, Civil Appeal No. X84 of 1967, from his judgment. Both counsel agreed that the fate of that appeal necessarily depends on the outcome of the present appeal.

In the court below the appellants' reply to the plea of *res judicata* was stated thus: that the appellants' present claim for a declaration of trust is based on a new and different cause of action arising from an equitable obligation of the vendor, as constructive trustee, to transfer the disputed lands. The cause of action in Civil Suit No. 120 of 1958, the appellants argued, arose solely or mainly from a contractual obligation. The learned trial judge, Wan Suleiman J. was, however, of the view that whatever might be the cause of action both contractual and equitable obligations were points which have been raised and decided by the Court of Appeal. He referred particularly to the following passage from the judgment of Thomson C.J.:[6]

> "... Alternatively he argued that whether or not the obligation arose *ex contractu* there was also an equitable obligation to transfer the land and here again, but in this case by reason of section 26 of the Kedah Enactment, the period of limitation was six years. Frankly I think there is very little substance in either argument. I do not, however, propose to discuss the points at length for by reason of section 33 of the Kedah Enactment, which has already been mentioned, calculations for the purposes of it are to be made according to the Mohammedan calendar. Calculating according to that calendar and making allowance for the suspension of limitation during the war a period of six years from 14th June, 1939, expired on 8th January, 1953, that is before the repeal of the Kedah Enactment and some years before the commencement of the present proceedings."

Thereupon Wan Suleiman, J. concluded in these words:

> "... The equitable obligation to transfer, if any, was therefore also time-barred, and the question of a constructive trusteeship cannot arise."

The memorandum of appeal contains six grounds, all of which, if I may say so, are directed to the question whether the rule of estoppel has been correctly applied. In ground (1) the complaint is that the learned trial judge erred in holding that the declaration in the present action had been raised before the Court of Appeal. I disagree. The "equitable obligation" referred to in the judgment was clearly that of a vendor as constructive trustee for the purchaser pending completion. The passage must speak for itself. In ground (2), the learned trial judge is said to have erred in holding that the equitable obligation to transfer was time-barred. The passage from the judgment cannot but lead him to say that it was time-barred. Thomson C.J. said it was time-barred under section 26 of the Kedah Enactment and held that the argument had no substance. Ground (3) can be answered in the same way. So also ground (6).

Grounds (4) and (5) call for a discussion of the rule of estoppel *per rem judicatam*. In the course of his judgment Wan Suleiman J. referred to the rule as formulated by Wigram V.C. in *Henderson* v. *Henderson*[2] which is this:

> "I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but

which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

Even if it be correct to say that the late Haji Ahmad had more than one cause of action against the respondent, the rule, as stated, would seem to require both causes of action to be brought forward in the same proceedings. The case of *Brunsden* v. *Humphrey*[7] has been referred to as going the other way. But as pointed out by Somervell L.J. in *Greenhalgh* v. *Mallard*,[8] *Brunsden's* case was a borderline case being a majority decision which could only be supported having regard to the English concept of trespass to person and trespass to goods. The rule in *Henderson* v. *Henderson, supra,* was approved by Lord Shaw in *Hoystead* v. *Commissioner of Taxation*[9] as "an authority which has frequently been referred to and followed and is settled law." It was applied in *Greenhalgh* v. *Mallard, supra,* where on page 257 Somervell L.J. had this to say:

"... I think that on the authorities to which I will refer it would be accurate to say that *res judicata* for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them."

The series of facts relied upon by the appellants for their present claim are substantially the same as those relied upon by the late Haji Ahmad in Civil Suit No. 120 of 1958. They are being deployed now by the appellants to support a claim under a different name which, in the words of Evershed L.J. in *Greenhalgh* v. *Mallard's* case *supra,* (page 259 *et. seq*), is "an abuse of the process of the court, and contrary to the principle that in the public interest there should be an end to litigation." In this case I am not all sure whether the late Haji Ahmad had more than one cause of action against the respondent. I prefer to think that he had only one cause of action founded on the right, contractual or equitable, to have the lands transferred to him.

Going back to the rule of estoppel *per rem judicatam* it is necessary to consider some of the cases cited in which the rule in *Henderson* v. *Henderson, supra,* was held inapplicable. The first is the Privy Council case of *Kok Hoong* v. *Leong Cheong Kweng Mines Ltd.*[5] which was an appeal from this country. The judgment of Viscount Radcliffe contains no suggestion disapproving the rule. On page 157 he merely said this:

"Their Lordships are satisfied that, where a judgment by default comes in question, it would be wrong to apply the full rigour of any principles as widely formulated as that of *Henderson* v. *Henderson*. It may well be doubted whether the Vice-Chancellor had in mind at all the peculiar circumstances of a default judgment and whether such a judgment would not naturally fall into his reservation of "special cases'. In any event it is clear from what has been said in other authorities more immediately directed to the point that a much more restricted operation must be given to any estoppel arising from a default judgment."

Later, on page 158 after referring to *Howlett* v. *Tarte*[10] as re-interpreted by the House of Lords in *New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.*,[11] Viscount Radcliffe went on to say:

"... This re-interpretation amounts to saying that default judgments, though capable of giving rise to estoppels, must always be scrutinised with extreme particularity for the purpose of ascertaining the bare essence of what they must necessarily have decided and, to use the words of Lord Maugham L.C., they can estop only for what must 'necessarily and with complete precision' have been thereby determined."

Needless to say the judgment of the Court of Appeal in this case was not a default judgment but one which was arrived at after the merits of each party's case had been argued and considered. The next case is *Thoday* v. *Thoday*[12] which was a divorce case in which Diplock L.J. discussed at some length the various species of estoppels. But there both Willmer L.J. and Diplock L.J. were clearly of the view that the rule of estoppel *per rem judicatam* "cannot be invoked so as to preclude the court from discharging the statutory duty laid on it under section 4 of the Matrimonial Causes Act 1950". That case does not help the appellants in any way.

The last case of some importance to the appellants is *Yaw Duedu* v. *Evi Yiboe*[4] which was an appeal to the Privy Council from the Ghana Court of Appeal. The respondent in that case had filed an action for a declaration of title to land and the appellant, as defendant, had counterclaimed for a similar declaration. Both parties had been involved in a previous litigation in 1944 in which the appellant sued the respondent in trespass. The claim failed and the magistrate's court, in its judgment, declared that the land alleged to have been trespassed belonged to the respondent. On appeal to the West African Court of Appeal the magistrate's decision was affirmed but that part of the judgment which declared the respondent's title to the land was deleted on the ground that the respondent had not counterclaimed for a declaration of title. To get round this "procedural difficulty" the respondent instituted the action as stated. He called no evidence but relied solely on the decisions of courts in the earlier proceedings which were in his favour. As a matter of procedure, the respondent was not obliged to counterclaim in the earlier proceedings. He could bring his claim in a separate action. It was this more than anything else which led Lord Hodson to say on page 1046:

"The ownership of the land was decided in favour of the plaintiff and should have settled his title to the land. If he had counter-claimtd he should have obtained a declaration of his title. Not having counter-claimed he was forced to get over his procedural difficulty by instituting fresh proceedings founded upon the judgment he had earlier obtained in order to obtain the relief which he seeks, that is to say, a declaration of his title to the land. To this relief he is plainly entitled."

In the instant case the appellants have more than a procedural difficulty to overcome. The finding of fact in Civil Suit No. 120 of 1958 that Haji Ahmad had paid the full purchase price was undoubtedly accepted by the Court of Appeal. That could only mean that his claim to the lands was well founded. The Court of Appeal had no doubt about it. But the appeal court was of the view that the claim was statute bar-

red. The only way to get round it was to appeal to the Privy Council. This the appellants failed to do.

For reasons shortly to be stated I have not considered the merits of the appellants' claim in the present action. The learned trial judge, Wan Suleiman J., was only concerned with the question whether the appellants were estopped from taking further action. His Lordship was not concerned with the merits of the action. Even if I were to disagree with him on the estoppel question, it is only right that the case should go back to the High Court to be disposed of on the merits. Whatever view I may have on the decision of the Court of Appeal it will not be relevant to the consideration of the present appeal.

I would accordingly dismiss this appeal with costs.

Ong Hock Sim F.J.: This is an appeal by the plaintiffs against the decision of Wan Suleiman J. given in the High Court at Alor Star, dismissing their claim for a declaration that the defendant, as registered proprietor of a half undivided interest in two parcels of land situate in Yen, Kedah, holds the same in trust for the plaintiffs, and for consequential orders and reliefs. The claim was defeated by a simple plea of *res judicata*, by virtue of a judgment of the Federation Court of Appeal given on December 4, 1959.

The trial of the action proceeded entirely on a statement of agreed facts and no evidence was called for either side. The agreed facts were as follows: —

"1. Haji Ahmad bin Haji Jusoh was the registered proprietor of 4 pieces of land held under Surat Putus Kechik No. 669 and No. 671 and Surat Putus No. 30415 and No. 30416 all situate in the District of Yen, Kedah.

2. Sometime in 1926, the said Haji Ahmad charged the said 4 pieces of land to one Karuppan Chettiar and to one Odyappa Chettiar.

3. On various dates in 1935 the charges on the 4 pieces of land were discharged and all 4 pieces of land were transferred to Odyappa Chettiar.

4. On 19th May, 1936 all 4 pieces of land were transferred by Odyappa Chettiar to Man bin Haji Saad and Siah binti Hassan.

5. On 14th day of July, 1936 an Agreement in Jawi was made between Haji Ahmad of the one part and Man and Siah of the other part which recited that the 4 pieces of land had been sold to Man and Siah for $1,300 and by which Man and Siah agreed to transfer the 4 pieces of land to Haji Ahmad if the sum of $1,300 was paid to them within 5 years of the date of the Agreement.

6. About 2 years after the 14th July, 1936 Haji Ahmad paid the sum of $1,300 to Man and Siah, who transferred the lands held under Surat Putus Kechik No. 669 to Haji Ahmad and Surat Putus Kechik No. 671 to Siah's daughter Mek Ah. At the same time Haji Ahmad obtained the 4 Grants of title to the said lands from Man and Siah and also took possession of the said lands which he cultivated until his death on the 18th August, 1966.

7. The 2 pieces of land held in Surat Putus No. 30415 and Surat Putus No. 30416 were not transferred to Haji Ahmad as part of the land held under Surat Putus No. 30416 had been acquired by the Government for a Malay School and the parties were waiting for new Grant title to be issued in respect of the remaining portion of the land.

8. Sometime on 23rd Zulhijjah, 1359 (i.e. 22nd January, 1941) the Land Officer Yen registered a Caveat Perunjok No. 1022/59 against Surat Putus No. 30416 and 2 other pieces of land in Surat Putus No. 30418 and No. 30419 on the ground that the Government intended to purchase the said lands for a Malay School and prohibited the sale, transfer or charge of the said lands.

9. Siah binti Hassan died on or about the 5th day of September, 1940 and Letters of Administration to her Estate were taken out by Haji Ahmad bin Haji Jusoh as creditor of the deceased in the Magistrate's Court at Yen on the 5th February, 1941.

10. Man bin Haji Jusoh died on or about the 10th day of November, 1944 and Letters of Administration to his Estate were taken out by Mek binti Awang as his lawful widow on the 13th April, 1958.

11. The Caveat on the land Surat Putus No. 30416 was removed by the Land Officer on the 24th July, 1958.

12. On or about the 27th day of August, 1958 Haji Ahmad bin Haji Jusoh filed Civil Suit No. 120 of 1958 in the High Court at Alor Star against Mek binti Awang as the Administratrix of the Estate of Man, deceased claiming for specific performance of the Agreement to transfer back the lands comprised in Surat Putus No. 30415 and No. 30416 Mukim of Sala Besar, District of Yen to the extent of ½ share.

13. The Suit was heard before Mr. Justice Hill who by a judgment dated the 19th May, 1959 found that the whole of the sum of $1,300 had been paid and that the claim was not barred by limitation. The Judge accordingly gave judgment in favour of Haji Ahmad.

14. Mek binti Awang then appealed to the Court of Appeal against the said judgment and the Court of Appeal allowed the appeal on the 23rd November, 1960 holding that Haji Ahmad's claim was barred by limitation.

15. Haji Ahmad subsequently appealed to the Privy Council against the decision of the Court of Appeal. This Appeal was withdrawn on the 18th day of September, 1965.

16. Haji Ahmad died on or about the 26th day of June, 1963 and Letters of Administration to his Estate were taken out by the Plaintiffs as the lawful son and daughter of the said deceased on the 4th day of October, 1967.

17. On the 8th day of December, 1965 Mek binti Awang as the Administratrix of the Estate of Man bin Haji Saad (deceased) filed Civil Suit No. 716 of 1965 in the High Court at Alor Star against Mek Ah binti Haji Saad claiming possession of the 2 pieces of land Surat Putus No. 30415 and No. 30416 (now Surat Putus Kechik No. 6763) to the extent of ½ share and for an account of the profits from the said lands.

18. Othman bin Haji Ahmad intervened in the Suit as the person in possession of the said land was made the second Defendant in the Suit. The Suit came on for trial in the High Court at Alor Star before Mr. Justice Gill and an Order for possession and accounts was made against Othman bin Haji Ahmad on the 24th September, 1967 and the claim against Mek Ah binti Haji Saad was dismissed.

19. Against this judgment Othman bin Haji Ahmad appealed to the Court of Appeal. The Appeal has been adjourned pending the trial of this Suit No. 68 of 1968."

Paragraphs 8 and 11 above, as will be noted, state facts which accounted for Haji Ahmad's delay in bringing his action for specific performance. The lands in question were caveated on January 22, 1941 by the land officer, so that any transfer of title was prohibited until the caveat was removed by the land officer some 14 years later, on July 24, 1958.

Haji Ahmad thereafter lost no time to perfect his title. On August 27, 1958 he commenced Civil Suit No. 120/58 against the defendant, the same person who is respondent in the present appeal. Hill J. found as a fact that Haji Ahmad had paid the purchase price of $1,300 in full to the vendors, for which he had been given possession of the lands as well as the titles thereto. He accordingly rejected the defence of limitation and gave judgment for the plaintiff. Had the defendant any right or claim to a legal or beneficial interest in the property, she ought to have made a counterclaim.

But her defence, apart from traversing the allegations, merely pleaded that the claim was barred by limitation. On this ground she had failed in the first instance.

Her appeal was on one ground only — that Hill J., on the pleadings, erred in law by holding that Haji Ahmad's possession of the lands defeated the plea of limitation. Hill J.'s decision was reversed. In the judgment of the Court of Appeal delivered by Thomson C.J., the learned Chief Justice took special note of the fact that "the trial judge's finding that the whole of the $1,300 was paid has not been attacked... and must be accepted". But, in the opinion of the court, the important point, in considering the question of limitation was not *whether* or not the money was paid, but *when* it was paid and, on this point, it was said that Hill J. had come to no conclusion. Therefore, the learned Chief Justice considered it a safe inference, on the evidence, that full payment of the $1,300 could not have been made later than June 14, 1939. On that basis then he proceeded without further ado to pronounce judgment on the question of limitation as follows: —

"The relations between the parties arose from the provisions of the agreement of 14th July 1936. Under that agreement when the plaintiff paid the $1,300 Man and Siah became subject to the obligation to re-transfer the land to him. That was the time for the performance of the obligation and it was for the performance of that obligation under the contract that the plaintiff brought the present proceedings."

Holding that section 22 of the Kedah Limitation Enactment was the law applicable — prior to the coming into force of the Federal Limitation Ordinance on February 19, 1953 — the learned Chief Justice went on: —

"Section 22 of the Kedah Enactment reads as follows:—

'No suit for the specific performance of a contract shall be brought after the expiration of three years to be calculated from the time fixed for the performance, or where no such time is fixed from the time when performance is demanded and refused.'

It is to be noted that by section 33 the calculation of time is to be made according to the Muslim calendar, under which the year is 354 or 355 days according to whether it is a kabisat year. Reckoning from 14th June, 1939, the period of three years prescribed by the section would have expired on some date in April, 1942. By reason, however, of the Limitation (Enemy Occupation) Ordinance, 1946, and the Moratorium Proclamation (Repeal) Ordinance, 1949, limitation did not run from 1st January, 1942, until 1st October 1949. In the present case, therefore, the period expired about the middle of 1950 (it is unnecessary to calculate the precise date) when the Kedah Enactment was still in force and the present proceedings were not commenced until 12th August, 1958. In my view then, the present proceedings were barred by limitation.

I would add that I am not unmindful of the argument of counsel for the respondent that by reason of the decision of this Court in *Ponnusamy & Anor.* v. *Nathu Ram* this was an action for the recovery of land and that therefore by reason of the provisions of the Limitation Ordinance the period of limitation was six years. Alternatively he argued that whether or not the obligation arose *ex contractu* there was also an equitable obligation to transfer the land and here again, but in this case by reason of section 26 of the Kedah Enactment, the period of limitation was six years. Frankly I think there is very little substance in either argument. I do not. however, propose to discuss the points at length for by reason of section 33 of the Kedah Enactment. which has already been mentioned, calculations for the purposes of it are to be made according to the Mohammedan calendar. Calculating according to that calendar and making allowance for the suspension of limitation during the war a period of six years from 14th June, 1939, expired on 8th January, 1953, that is before the repeal of the Kedah Enactment and some years before the commencement of the present proceedings."

With respect, I am of opinion that the above decision — in so far as the question of limitation was decided against a purchaser *in possession* of both the lands and title deeds thereto — was made *per incuriam*. In such a case, for limitation to start running, it is not the date of execution of the contract which mattered, but the date when a breach was committed. Thus, in *Bolo* v. *Koklan & Ors.*[13] their Lordships of the Privy Council said: —

"There can be no 'right to sue' until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted."

Following that Privy Council decision, Gill F.J. delivering the judgment in *Nasri* v. *Mesah*[14] of the Federal Court said: —

"In *Board of Trade* v. *Cayzer, Irvine & Co.* Viscount Dunedin described 'cause of action' as that which makes action possible. Now, what makes possible an action founded on a contract is its breach. In other words, an action founded on a contract accrues on the date of its breach. Similarly, the right to sue on a contract accrues on its breach. In the case of actions founded on contract, therefore, time runs from breach (*per* Field J. in *Gibbs* v. *Guild*)."

Williams v. *Greatrex*[15] unfortunately was not brought to the attention of the Court of Appeal in 1959. The principles therein enunciated were so clearly applicable that it is impossible to conceive that our Appeal Court would lightly have brushed them aside, without saying a word to explain why those principles should not apply. There, the purchaser of two building plots had, in October 1946, paid the deposits towards the purchase price and entered into possession pursuant to contract, which provided that on payment of the balance the vendor would execute a proper conveyance of the said two plots. After going into occupation the purchaser had done certain work and incurred expense on the land. In April 1947, the vendor ordered the purchaser off the land, but, nevertheless, in 1948 the latter put up and made use of a garage thereon, though unable to do more because he was unable to obtain building licences. In December 1955 the vendor entered into an agreement to sell the same plots to a third party. Thereupon the purchaser brought an action against the vendor in 1956, asking for specific performance of the contract, which bore a date 10 years earlier, May 28, 1946. The relevant headnote reads: —

"**Held,** (3) That the purchaser, having paid the deposits on and having entered into possession of the land, became the equitable owner of the land under a contract binding on the vendor such that the vendor could not now object to specific performance on the ground of laches unless he could show that he had not acquiesced in the purchaser's acts of possession or that the purchaser had abandoned the contract; and that the evidence showed sufficient acquiescence by him and no abandonment by the purchaser. Accordingly, despite the lapse of time, the purchaser was entitled to specific performance on payment of the balance of the price and interest thereon for the intervening years."

In his judgment Denning L.J. (as he then was) said: —

"The purported repudiation by the vendor in April, 1947, was entirely inoperative. He could not renounce a binding

contract in that way. The purchaser did not accept the repudiation as a rescission of the contract. ..... He still remained in possession of the land,.....
But then it is said: when the vendor repudiated this contract, surely the purchaser ought to have taken him to court; he ought to have brought an action for specific performance then and there to compel him to perform his contract. I confess that that argument did appeal to me at one time in the course of the case. A very long time elapsed without his taking the vendor to court. But I think the answer to it is this: once the purchaser went into possession of the land, having the contractual right to be there, he not only had an equity to be there, but also the benefit of a contract to sell him these two plots. That was not only an equity: it was an equitable interest in the land. He was in a sense the equitable owner of the land. So long as he was in possession of the land, he does not lose his rights simply by not proceeding at once for specific performance."

As to the vendor's acquiescence in the purchaser's continued possession his Lordship went on: —

"If he wished to exclude the purchaser, he ought to have taken possession himself. He never did so. I am quite clearly of opinion that, as long as the purchaser remained in possession under a contract which entitled him to be there, he had an equity which the courts will protect. There was no need for him to claim specific performance in order to give him a right to be there. Laches or delay is not a bar to this action."

In a concurring judgment Hodson L.J. (as he then was) cited with approval Cotton L.J. in *Mills* v. *Haywood*[16] where his Lordship said: —

"In such a case, as, *e.g.*, where the purchaser in possession has no right or title to such possession except as purchaser, his possession is an assertion on his part of his right under the contract of purchase, and acquiescence in his possession is a recognition by the vendor of this right."

In the instant case the fact that Haji Ahmad was rightly in possession of the lands and in possession of the titles thereto, pursuant to the contract of sale, had never been challenged by the vendor or by his legal personal representative until the action taken by this purchaser to clothe and perfect such possession with the legal title. Indeed, the limitation period, whether 3 years or 6 years, had not expired when the action was commenced for two reasons: (a) that his title was not challenged and no breach of contract had been committed or threatened, so as to start the time running and (b) that on the evidence, confirmed by the statement of agreed facts, within less than 2 years after payment of the purchase price supervened the inability of the vendor to execute any transfer by reason of the caveat which subsisted for 14 years. Action was commenced for specific performance about one month after the caveat was removed. This was reason enough for the purchaser not demanding the transfer during those 14 years and, there being no such demand made, no occasion ever arose for its repudiation in breach of contract. It is, as previously stated, the breach which starts time running and section 22 of the Kedah Limitation Ordinance in clear terms provided that "where no time is fixed for the performance" limitation should be calculated "from the time when performance is demanded and refused." For the reasons abovestated I have no hesitation in saying that in my opinion Hill J. was eminently right in his decision.

Haji Ahmad's further appeal to the Privy Council was withdrawn. Hence the judgment of the Court of Appeal was final and, whether right or wrong, cannot be called in question by any court. The finality and conclusiveness of the judgment, however, established one fact in favour of Haji Ahmad beyond all shadow of doubt — that the purchaser having paid the purchase price in full was the true beneficial owner of the lands and the vendor after receipt of full payment became a bare trustee thereof for the beneficial owner: see *Bridges* v. *Mees*[17] and *Lysaght* v. *Edwards*.[1]

For all practical purposes the rights of a purchaser, under the Torrens system, who has paid the full purchase price of the land sold to him, are not any different from the position under English law. Under the Torrens system, Thomson J. (as he then was) said in *Bachan Singh* v. *Mahinder Kaur*[18] as follows: —

"To my mind, many of the difficulties which appear to arise in these cases would not arise if we were to bear in mind throughout the distinction between rights *ad rem* or personal rights and rights *in rem* or real rights. Where there is a valid binding contract for the sale of land, the purchaser, when he has performed his side of the contract, acquires a right *ad rem* which is also a right *in personam*. In other words, he acquires a right to the land as against the vendor personally but not good against the world as a whole and, in due course, that right can become a real right good against the world as a whole on registration in accordance with the Land Code....."

Haji Ahmad's substantive rights were never questioned, much less taken away, by the appeal court judgment. Statutes of limitation (as in this case) which bar the remedy, but *not the right*, are rules of procedure only: (see 24 *Halsbury* 3rd Ed. page 181). The order of that court made on December 4, 1959 contains not a word which can be said to affect Haji Ahmad's rights *in rem* but merely in effect deny him the right *in personam* or *ad rem* which he sought by his claim to specific performance. Indeed, the judgment in that case in the clearest of terms stated that the finding as to the full payment of the purchase price was not attacked and therefore must be accepted as conclusive on that score.

All the merits, therefore, lie with the case of the present appellants. Indeed, this, too, was the view of Gill J. (as he then was) in his judgment, to be found on the record, given by him in Civil Suit No. 216/65, although he felt constrained to decide adversely to them, upon his view of the law. For my own part, I feel that it is the duty of the courts to exercise the utmost diligence in applying the maxim *ubi jus ibi remedium*, so that justice shall be done, unless we are strictly constrained by law to uphold any decision which results in injustice.

In this connection I think the case of *Bachan Singh*[18] is not only illuminating but also helpful in arriving at a just and fair decision. There the remedy sought to enforce specific performance of a contract of sale, which was fully executed by the purchaser (as in the instant case), was not by a claim based on contract, but by invoking the powers of the court under section 240 of the Land Code, then in force, which provides as follows: —

"In any proceeding respecting any land or in respect of any transaction or contract relating thereto, or in respect of any instrument, caveat, memorial or other proceeding affecting any land, the Court may by order direct the proper registering authority to cancel, correct, substitute or issue any document of title, or to make any memorial, or otherwise to do such acts or make such memorials as may be necessary to give effect to the judgment or order of the Court."

The same extensive powers are now given to the courts by section 417 of the National Land Code in these terms: —

"417. (1) The Court or a Judge may by order direct the Registrar or any Collector to do all such things as may be necessary to give effect to any judgment or order given or made in any proceedings relating to land, and it shall be the duty of the Registrar or Collector to comply with the order forthwith."

When Haji Ahmad failed in his action, it was his remedy, by a claim to specific performance, that was barred. No pronouncement by the Court of Appeal in any way derogated from his substantive rights. His failure was merely on a procedural objection. On the other hand, the present respondent has established no right to the possession of the lands. Any action by her claiming possession must be barred — and barred in two ways. First, she can only succeed if she can establish a better right to possession, and that is clearly impossible against a purchaser for value. Secondly, notwithstanding that *adverse* possession for any length of time can never extinguish the title of the registered proprietor, whether under section 43 of the Land Code (now repealed) or under section 341 of the National Land Code, the law now in force is still inoperative so as to clothe the title of a bare trustee with the flesh and bones which go with the registration of title on the part of a beneficial owner. Section 341 reads: —

"Adverse possession of land for any length of time whatsoever shall not constitute a *bar* to the bringing of any action for the recovery thereof by the proprietor or any person or body *entitled to an interest therein*, and accordingly, the Limitation Ordinance, 1953, shall in no circumstances operate to extinguish any title to, or interest in, land."

This section, in effect, provides that no title can be acquired by prescription. Adverse possession means adverse to the registered proprietor. The registered proprietor must be one *entitled to an interest* in the land. A fully paid vendor who retains his title only on the register, as a bare trustee, has no interest whatsoever in the land. The possession of the purchaser is pursuant to the contract of sale and therefore not adverse, but rightful. The position of the parties to this appeal may be appropriately described as a stalemate. The appellants have possession of the lands and are entitled to all the rents and profits thereof. They cannot be dispossessed by the respondent. On the other hand the respondent can never be in any better position than she is in at present. She is worse off than the dog in the manger, which, at least, has possession *de facto*, though not *de jure*. In this state of affairs, where the appellants have the *jus*, should they not also have the *remedium*?

I think that, on the judgment of Hill J., which was in no way affected by that of the Court of Appeal, the appellants should be entitled to the declaration sought. Is this court powerless, merely by reason of the cause of action pleaded by Haji Ahmad, to give the appellants any relief? What they now pursue is a different cause of action from specific performance sought by their father, the Haji. They assert their title and interest, which is a right *in rem*, to the lands. The judgment of Hill J. is conclusive on this point. *Res judicata* only bars specifically their claim *in personam*. In my view, for which support may be found in the judgment of Thomson J. (as he then was) in *Bachan Singh's* case, the court has powers now under section 417(1) of the National Land Code as it then had under the Land Code to make such order as it thinks just and proper. As I have said earlier, the maxim to be applied is *ubi jus ibi remedium*. The declaration to which the appellants are entitled serves no purpose without the further consequential order. For my part, I think it is right that an order be made, as a necessary corollary to such declaration, that the proper registering authority do cause the necessary entries and memorials to be made in the issue and register documents of title for the appellants to be registered as proprietors of the lands concerned in respect of the undivided interests as claimed.

I would accordingly allow this appeal with costs, here and in the court below.

Appeal allowed.

Solicitors: *Jayadeva & Zahir; Eugene Khoo & Co.*

HALIJAH v. MORAD & ORS.

[F.C. (Azmi L.P., Gill and Ali F.JJ.) August 3, 1972]

[Alor Star — Federal Court Civil Appeal No. 76 of 1971]

Infants — Agreement — Contract for repayment of money lent — Void against infants.

Limitation — Claim for transfer of Land — Possession of land given as a creditor and not as a purchaser in order to collect profit — Kedah Enactment No. 60 (Limitation) and Limitation Ordinance, 1953.

This was an appeal against the decision of the High Court on a claim by the respondents/plaintiffs against the appellant/defendant for possession of a piece of land, and damages for trespass.

The appellant admitted occupation of the land but stated that she occupied it by virtue of a written agreement signed by them and their mother, now deceased, on April 12, 1948. The agreement concerned the loan of money on the security of the land in question. The appellant counterclaimed for an order that the land be transferred to her in pursuance of the aforesaid agreement.

The respondents denied ever executing the agreement, or in the alternative, if they had executed the agreement, they were infants at the time of the execution and that they had not ratified it. They alleged that the counterclaim was barred by limitation.

The respondents elected not to give evidence at the trial.

The learned trial judge found that on the date when the agreement was executed, the first and second respondents had reached the age of majority, but not the third and fourth respondents. He came to this view by applying the provisions of the Kedah Enactment No. 62 (Majority).

Held, dismissing the appeal: (1) the law to be applied in regard to a contract entered into by an infant at the material time, in Kedah, was the common law of England as qualified by the English Infants Relief Act, 1874. As the agreement in the present case was nothing more than a contract for repayment of money lent, it was absolutely void as regards the infant respondents. Therefore, the appellant's counterclaim against the third and fourth respondents must fail;

(2) the appellant was not given possession of the land as a purchaser but as a creditor in order to give her security for the loan and also to enable her to collect the profit from the land in place of interest for the loan. Since her claim for transfer of the land had been filed on October 5, 1965, the appellant was out of time both under the Kedah